commits that kind of offence. The circumstances of this case are very much different.

Lawyers trade on their honesty. They sell their trustworthiness. Accordingly, one of the gravest offences an advocate and solicitor can commit is to take his clients' money. Criminal breach of trust by a lawyer in the discharge of his professional duty must inevitably call for a custodial sentence of a deterrent nature, not so much as to deter the offender concerned but to deter other members of his profession from committing similar offences.

I will now refer to two other cases of criminal breach of trust committed by lawyers. In MA No 21 of 1975, the Chief Justice dismissed an appeal against a six-year sentence on a solicitor who had pleaded guilty to seven charges of criminal breach of trust of clients' money from 1972 to 1973. The total amount involved was slightly in excess of $200,000. The senior district judge had imposed a term of imprisonment of three years for each offence, the first two sentences to run consecutively, and the other five sentences to run concurrently with the first two sentences.

In 1979, another solicitor also pleaded guilty to four charges of criminal breach of trust (see DAC Nos 415/79, 417/79, 592/79 and 595/79). The total amount involved was about $1,480,000, of which restitution in the amount of about $543,590 had been made and a further sum of about $100,000 was available from the sale of his house. He was sentenced to imprisonment for a term of four years on each of the first two charges and three years' imprisonment on the remaining two charges. The judge made one of the three-year sentences consecutive with one of the four-year sentences, and the rest to run concurrently, with the result that the total custodial sentence imposed was seven years. The solicitor concerned did not appeal and this was consistent with the solicitor's statement in his plea of mitigation that he was prepared for any punishment that the court might pass upon him. His conduct demonstrated his genuine remorse for his wrongdoings.

For the reasons I have given, the consecutive sentences amounting to six years' imprisonment passed on the appellant are not excessive in the present case. The appeal is dismissed.

Appeal dismissed.

Solicitors: *Haridass Ho & Partners.*

Reported by *Mathavan Devadas*

People's Parkway Development Pte Ltd v Ramanathan Yogendran

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NO 579 OF 1990
THEAN J
22 OCTOBER 1990

Legal Profession — Solicitor's undertaking — Construction of undertaking — Whether there is final adjudication of the dispute to which the undertaking relates — Meaning of final adjudication — Legal Profession Act (Cap 161, 1985 Ed), s 79

Words and Phrases — 'Final adjudication of the dispute'

The plaintiffs sought to enforce an undertaking given by the defendant, a solicitor, in relation to a dispute between the plaintiffs and the defendant's clients over a tenancy agreement. The defendant had given an undertaking to the plaintiffs to pay a maximum sum of $100,000 on account of rent and service charges for the period 1 June 1986 to 14 October 1986 which may be ordered against the defendant's clients on final adjudication of the rental dispute.

The clients had difficulties paying rent and service charges under the tenancy agreement and surrendered the premises to the plaintiffs in April 1987. On 7 May 1987, the plaintiffs, with the defendant's consent, instituted an action against the clients claiming, inter alia, rent and service charges for the period 1 June 1986 to 14 October 1986. The clients filed a defence but was subsequently wound up upon a petition presented by one of its creditors.

The plaintiffs' solicitors corresponded with the Official Receiver and liquidator of the clients who replied that he had no objection to the plaintiffs proceeding with the action against the clients and that he would consent to judgment with no costs against the clients. The plaintiffs subsequently obtained a consent judgment against the defendant's clients. The defendant was not informed nor served with the application.

The plaintiffs sued the defendant to enforce the undertaking. The issue was whether the dispute in respect of which the undertaking was given has been finally adjudicated.

Held, dismissing the plaintiffs' application:

(1) The defendant, by reason of the undertaking given, is plainly interested in the dispute between the plaintiffs and the clients. He is in a position analogous to a guarantor or an insurer of the clients and ought to be informed and served with the application for consent judgment.

(2) The defendant was not served with any notice of the application. He was not even informed at all of the application or the Official Receiver and liquidator's consent to judgment. It is not suggested and there is no evidence that the defendant has in any way given his consent. So far as the defendant is concerned, the dispute on which the clients' liability depends and in respect of which the defendant gave his undertaking has not been finally adjudicated.

(3) The parties at the time [the undertaking was given and accepted] contemplated 'an adjudication' of the dispute. The defendant's obligation on the undertaking was to be triggered off by an order made for payment to the plaintiffs of the rent and service charges (for the period in question) of the premises 'on a final adjudication of the dispute'.

(4) The expression 'final adjudication of the dispute' does not mean a mere pronouncement or recording of a judgment.

It means 'a consideration and determination of the dispute, involving the court exercising its mind on the dispute, examining the evidence, whatever may be the form of evidence, whether viva voce or affidavit evidence, applying the relevant law and finally giving a decision or judgment on the dispute'. In this case, there was no such adjudication of the dispute.

Cases referred to

1 *Gurtner* v *Circuit* [1968] 2 QB 587 (folld)
2 *Re Idenden (A Bankrupt)* [1970] 2 All ER 387 (folld)
3 *Reardon Smith Line* v *Hansen - Tangen* [1976] 1 WLR 989 (folld)
4 *Re Riddell, ex p Earl of Strathmore* (1888) 20 QBD 512 (distd)
5 *Re South American And Mexican Co, ex p Bank of England* [1895] 1 Ch 37 (distd)
6 *Burnaby* v *Robert Earle* (1874) 9 LR QB 490 (distd)

Legislation referred to

Subordinate Courts Rules 1986 O 15 r 6(2)

David Liew for the plaintiffs.
Sivagnanam Santhiran for the defendant.

Cur Adv Vult

Thean J: By this originating summons the plaintiffs seek to enforce an undertaking given by the defendant, a solicitor then practising under the name and style of Yogen & Partners. The undertaking was given by the defendant in relation to a dispute between the plaintiffs and the defendant's clients, Clement D'Cruz Food (S) Pte Ltd (in liquidation) ('the company') over a tenancy agreement made between them in respect of the premises unit 01-01/02, Parkway Builders' Centre. The undertaking was contained in an exchange of telexes between the plaintiffs' then solicitor, Mr P Balachandran, and the defendant. It started with the telex from Mr Balachandran to the defendant on 22 September 1986, which, so far as material, is as follows:

> Re: Unit 01-01/02 Parkway Builders' Centre
>
> Following discussions between the principals of our respective firms on 19 September 1986, the following terms were agreed in relation to the tenancy of the abovementioned premises ('the premises') subject to our respective clients' confirmation:
>
> (1) The dispute between our respective clients on whether the tenancy runs from 1 June 1986 as previously agreed or 15 October 1986 (as your clients now claim it should be) shall be referred to adjudication in the Subordinate Courts within 14 days of your clients providing the security hereinafter referred to.
> (2) Your clients shall provide to our clients security of $100,000 to account of rent and service charge for the period 1 June 1986 to 15 October 1986. At your clients' request, our clients have agreed to your firm giving our clients an undertaking to pay up to a maximum sum of $100,000 on account of rent and service charge which may be ordered to be paid to our clients on the final adjudication of the matter referred to in cl 1 above. After final adjudication, your firm shall pay our clients forthwith on demand the sum ordered by court to be paid to our clients as rent and service charge.
> (6) All other disputes, if any, in respect of the tenancy of the premises shall be referred to adjudication in the Subordinate Courts.
>
> Please confirm the above terms by telex and let us have the undertaking referred to in cl 2 above. Your clients' suit No 4953 of 1986 has been adjourned to 26 September 1986. Your clients have agreed to withdraw their application for an injunction on the above terms.

In reply, the defendant telexed to Mr Balachandran the following:

> Re: 0-01/02 Parkway Builders' Centre
>
> Yr tlx dd 22 September 1986 refers.
>
> We confirm tt our firm will provide an undertaking to u as agents of People's Park Development Ltd to pay to a maximum sum of $100,000 on a/c of rent n service charges which may be ordered agst our clt on final adjudication in respect of the rental dispute arising from agmt of 5 March 1986 for the period from June 1986 to 14 October 1986.
>
> We also confirm the following:
>
> (1) We will transfer the present dispute for adjudication to the sub-cts if the law allows it within 14 days.
>
> We r of the view tt this is more than sufficient for yr clts to open the premises by 5pm today, failing which our undertaking ceases n we will no choice but to litigate.

This was not quite acceptable to Mr Balachandran who insisted that the defendant should amend the undertaking by substituting the words 'hereby gives' for the words 'will provide', and this was agreed by the defendant in his telex of 24 September 1986. These then were the material telexes in exchange, and they contained the full terms of the undertaking, on which there is no dispute.

The company subsequently had difficulties in paying rent and service charge under the tenancy agreement and in April 1987 surrendered possession of the premises to the plaintiffs. On 7 May 1987, the plaintiffs, with the consent of the defendant, instituted an action against the company in the district court in DC Suit No 369 of 1987, and the writ was served on the company. By the statement of claim, the plaintiffs claimed, among other things, rent and service charge for the period from 1 June 1986 to 14 October 1986 amounting to $115,546.49. To the statement of claim, a defence was filed by the defendant on behalf of the company on 29 June 1987. Whilst this action was in progress, a winding-up order was made against the company on 6 September 1987 upon a petition for winding-up presented by one of its creditors. After the winding-up order was made, the plaintiffs' solicitors on 10 January 1989 wrote to the Official Receiver and liquidator of the company explaining at great length the merits of their clients' case and indicating that they would like to enforce the undertaking against the defendant. The Official Receiver and liquidator then referred the matter to the defendant, and correspondence between him and the defen-

dant ensued. It was not shown to me what exactly transpired between them. It appears to me, however, that nothing really turns on what they wrote to the other. On 13 June 1989 the Official Receiver and liquidator of the company wrote to the plaintiffs' solicitors saying that he had no objection to the plaintiffs proceeding with the action in DC Suit No 3679 of 1987 and that he would consent to judgment, provided that no costs were awarded against the company.

On 17 November 1989, the plaintiffs applied by way of originating summons to the High Court for leave to proceed with the action, and leave was granted on 17 November 1989. The plaintiffs then on 24 November 1989 took out an application by way of Summons-in-Chambers No 14526 of 1989 in DC Suit No 3679 of 1987 for leave to enter interlocutory judgment against the company and for damages to be assessed by the register. The application for leave to enter judgment was not served on the defendant; nor was he in any other way informed of the application. On 11 January 1990, the plaintiffs obtained an order by consent to enter final judgment against the company for the sum of $216,578 together with interest and costs against the company. Following that, on 8 February 1990, the plaintiffs entered judgment by consent against the company for the sum of $216,578 together with interest in the sum of $9,794.70.

Armed with the judgment, the plaintiffs called upon the defendant to honour the undertaking, and upon the defendant refusing to do so, initiated these proceedings against him to enforce the undertaking.

In my opinion, there are two difficulties in the way of the plaintiffs' claim. First, the defendant, by reason of the undertaking given, is plainly interested in the dispute between the plaintiffs and the company, namely, whether the tenancy of the premises commenced from 1 June 1986 or 15 October 1986, on which the company's liability to pay rent and service charge for the period from 1 June 1986 to 14 October 1986 depends. Should it be held that the tenancy commenced from 1 June 1986 the defendant would be liable on the undertaking to pay a substantial part of the rent and service charge up to the maximum amount of $100,000. He is in a position analogous to that of a guarantor or an insurer of the company in respect of such liability to the extent of $100,000. Therefore, if the plaintiffs wish to apply to court for a consent judgment to be entered against the company in DC Suit No 3679 of 1987 for payment of such liability, the defendant ought to be informed and served with notice of the application. It seems to me that the defendant may well be a person 'whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon': see O 15 r 6(2) of the Subordinate Courts Rules 1986.

There are two cases which bear on this point. In the leading case of *Gurtner* v *Circuit*,[1] the Court of Appeal allowed the Motor Insurers' Bureau to be added as a party in an action instituted by an injured pedestrian against the motor cyclist who had emigrated and could not be traced, as the bureau was under an obligation to the Minister of Transport to satisfy any unpaid damages awarded to the plaintiff. Lord Denning MR in his judgment said, at p 595:

> It seems to me that when two parties are in dispute in an action at law, and the determination of that dispute will directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill, then the court in its discretion may allow him to be added as a party on such terms as it thinks fit. By so doing, the court achieves the object of the rule. It enables all matters in dispute to 'be effectually and completely determined and adjudicated upon' between all those directly concerned in the outcome.

Diplock LJ, the other member of the court, said, at pp 602 to 603:

> Clearly the rules of natural justice require that a person who is to be bound by a judgment in an action brought against another party and directly liable to the plaintiff upon the judgment should be entitled to be heard in the proceedings in which the judgment is sought to be obtained. A matter in dispute is not, in my view, effectually and completely '*adjudicated upon*' unless the rules of natural justice are observed and all those who will be liable to satisfy the judgment are given an opportunity to be heard. In the case of an ordinary insurer, this does not arise in practice, since the standard terms of a third-party liability policy give to the insurer a contractual right to conduct the defence of the running-down action in the name of the assured. But as I read his judgment in the *Fire Auto & Marine* case [1964] 2 QB 687, Jone Stephenson J would have allowed an ordinary insurer to be added as a party to a running-down action if the policy of insurance did not contain such a term. And this, I think, would be right.

Upon the same principle, it was held in *Re Idenden (A Bankrupt)*[2] that a surety, who would be directly affected by the determination of the question whether a payment made by the bankrupt (prior to his bankruptcy) to the creditor to whom the surety issued a guarantee was a fraudulent preference, ought to be made a party in the proceedings. Stamp J said:

> It would be quite contrary to principle to decide the question without giving the surety the opportunity of adducing such evidence as he had and making such submissions as appear to him appropriate.

Reverting to the facts in this case, in DC Suit No 3679 of 1987 the defendant was not served with any notice of the application taken out by the plaintiffs for leave to enter judgment against the company; indeed he was not even informed at all of the application or of the fact that the Official Receiver and liquidator of the company had agreed to consent to judgment. It has not been suggested, and there is no evidence, that the defendant has in any way given his consent to the application. Hence,

so far as the defendant is concerned, the dispute whether the tenancy of the premises commenced from 1 June 1986 or 15 October 1986, on which the liability of the company for payment of rent and service charge depends and in respect of which he gave the undertaking, has not been finally adjudicated. In passing, I should mention that if the defendant had been served with the notice of the application for leave to enter judgment against the company and, like the Official Receiver and liquidator of the company, had consented to the judgment being entered, he would be estopped from asserting that the dispute has not been adjudicated.

The second difficulty with which the plaintiffs are confronted arises from the true construction of the undertaking. In construing the undertaking, the court must 'place itself in thought in the same factual matrix as that in which the parties were' (per Lord Wilberforce at p 997 in *Reardon Smith Line* v *Hansen-Tangen*[3]) at the time the undertaking was given and accepted. And the factual matrix is this. As shown in the exchange of telexes, to which I have adverted, there was at that time a dispute between the plaintiffs and the company, and the dispute was whether the tenancy of the premises commenced from 1 June 1986 or from 15 October 1986. The parties agreed that that dispute should be referred to a subordinate court, ie the district court, for adjudication. If the court should adjudicate that the tenancy commenced from 1 June 1986, the company would be liable to pay, and would be ordered by the court to pay, the rent and service charge of the premises for the period from 1 June 1986 to 14 October 1986. It is in respect of this contingent liability of the company that the defendant gave the undertaking to the plaintiffs, and the undertaking was to pay a sum up to $100,000 on account of rent and service charge 'which may be ordered to be paid to [the plaintiffs] on the final adjudication of the [dispute]'. It is clear that the parties at the time contemplated 'an adjudication' of the dispute and the obligation of the defendant on the undertaking was to be triggered off by an order made for payment to the plaintiffs of the rent and service charge (for the period in question) of the premises 'on the final adjudication of the dispute'. In the events that occurred, there was an order made for payment, namely, the consent judgment entered which 'ordered' the company to pay the sum of $216,578, which includes the amount representing the rent and service charge of the premises for the period from 1 June 1986 to 14 October 1986. However, the question is whether there was a 'final adjudication' of the dispute in question.

Counsel for the plaintiffs submits that 'to adjudicate upon' means 'to arrive at a definite conclusion one way or another' and 'adjudication' means 'a judgment or decision of the court', and that the consent judgment obtained by the plaintiffs against the company in DC Suit No 3679 of 1987 was a final adjudication of the suit and was a final judgment against the company. He relies on para 1520 of 16 *Halsbury's Laws of England* (4th Ed), which states:

> Judgment by consent or default. A judgment which would be final if it resulted from judicial decision after a contest is not prevented from being so by the fact that it was obtained by consent or default, or as the result of admissions, provided the party against whom it is set up was under no disability; but the efficacy of a judgment so obtained is somewhat strictly limited.

That undoubtedly is the position between the plaintiffs and the company. However, in so far as the defendant is concerned, it still leaves unresolved the question whether there was an adjudication of the dispute.

Counsel for the plaintiffs further relies on *Re Riddell, ex p Earl of Strathmore*[4] and *Re South American And Mexican Co, ex p Bank of England.*[5] Neither of these cases is of any assistance to me. In the first case, the question was whether an order for the dismissal of an action for want of prosecution and the payment of costs by the plaintiff was a 'final judgment' within the meaning of the Bankruptcy Act 1883, and it was held by the Court of Appeal that it was not. What was discussed and adumbrated in the Court of Appeal was what constituted a final judgment. Counsel for the plaintiffs relies on the following passage from the judgment of Lord Esher MR at p 516:

> In my opinion the question is, not only was the claim determined, but was it finally determined? It can only have been finally determined if between the two parties to the action it cannot be raised again. If between those two parties the question of the plaintiff's alleged right as existing before he brought the action was finally determined, then, whether it was tried 'on the merits' or not, the order (assuming that it was a 'judgment', a question which I do not intend to decide) is a 'final judgment'.

However, that pronouncement of Lord Esher is not relevant to the issue in the instant case. There is no dispute here that as between the plaintiffs and the company the consent judgment obtained by the plaintiffs was a final judgment. The issue here is: for the purpose of the undertaking given by the defendant, was there an adjudication of the dispute which resulted in the judgment?

Similarly, in *South American And Mexican Co*[5] the point decided was quite different. There, a compromise was arrived at after the commencement of the trial of the action initiated by Bank of England against South American And Mexican Co, and judgment by consent was entered against the company. Subsequently, the company was ordered to be wound up, and in the winding-up the bank claimed to prove the balance sum due, but the official receiver and liquidator rejected the proof on the same grounds as those alleged as a defence to the action and maintained that the judgment was not

binding on the company. It was held by Vaughan Williams J that the judgment was binding upon the parties to the action in just the same way as if it had been a judgment arrived at after the case had been fought out. His decision was affirmed by the Court of Appeal.

Finally, counsel for the plaintiffs relies on *Burnaby* v *Robert Earle,*[6] which is a case involving the construction of the words 'determination of an action' in the condition of a bond. There, the plaintiff recovered a verdict for £545 in an action against the defendant, Henry Earle. Thereafter, an order was made staying the proceedings in the action until the fifth day of the following term, on one Robert Earle giving security for the amount of such verdict and a bond was subsequently executed by him and another person for the purpose of giving such security. The condition of the bond was that 'if the determination of the said action should be in favour of the plaintiff', Henry Earle and the sureties of the bond (one of them was Robert Earle) should pay to the plaintiff the said sum, then the obligations under the bond would be void. A rule was then obtained in the Court of Exchequer to set aside the verdict, which rule was afterwards discharged. Henry Earle then gave notice of appeal under s 37 of the Common Law Procedure Act 1854, but no bail was put in under s 38 of that Act, nor were any further steps taken by him to prosecute the appeal down to the date, when an action was commenced against the defendant, Robert Earle. Under the provisions of the Common Law Procedure Act 1854 if no bail had been put up, the notice of appeal did not operate as a stay of execution on the judgment or affect the judgment in any way. It was held that as there was at the commencement of the action a judgment in favour of the plaintiff and there was no stay of execution on that judgment, such a state of things amounted to 'a determination' of the action in favour of the plaintiff within the meaning of the condition of the bond. Lush J said, at p 493:

> The words of the condition are, 'if the determination of the said action shall be in favour of the plaintiff,' &c. We are of opinion that, as there was at the commencement of this action a judgment in favour of the plaintiff, and there was no stay of execution on that judgment, such a state of things amounts to 'a determination' of the action in favour of the plaintiff within the meaning of the condition. Had the defendant, by putting in bail or otherwise, obtained a stay of execution on the judgment, we are disposed to think that then, though there would still have been a valid judgment in favour of the plaintiff, there would not have been such a determination of the action in his favour as is contemplated by the condition of this bond. But where, as in this case, the plaintiff has obtained a judgment in his favour, and is in a condition to enforce it by execution, the action, as far as he is concerned, may be properly said to be determined in his favour, and unless the amount mentioned in the condition is paid the bond is forfeited.

Counsel for the plaintiffs submits that the facts in that case were very similar to those in the present case and relies on the construction of the words 'a determination' of the action as decided by Lush J. I am unable to accept this submission. The facts there were quite different. At the time the bond was given, there was already a judgment in favour of the plaintiff and the bond was given to procure a stay and to enable Henry Earle to obtain a rule to set aside the verdict, which rule was obtained but was subsequently discharged, and the appeal filed by Henry Earle was not pursued. The case therefore does not assist the plaintiffs; in fact, it has no relevance here.

It is abundantly clear in this case that the expression, 'final adjudication of the dispute', does not mean a mere pronouncement or recording of a judgment. It means a consideration and determination of the dispute, involving the court exercising its mind on the dispute, examining the evidence, whatever may be the form of evidence, whether viva voce or affidavit evidence, applying the relevant law and finally giving a decision or judgment on the dispute. In this case, however, there was no such adjudication of the dispute by the district court. All that transpired was this: the plaintiffs' counsel and presumably the representative of the Official Receiver and liquidator of the company appeared before the district court; the plaintiffs obtained by consent leave to enter judgment, and judgment by consent was finally entered against the company. That, in my judgment, is not an adjudication of the dispute within the meaning of the undertaking.

In the result, this claim must fail; the defendant is not liable on the undertaking he had given. Accordingly, the application is dismissed with costs.

Application dismissed.

Solicitors: *Robert WH Wang & Woo; Santhiran & Partners.*

Reported by *Jeff Leong Pak Lim*